

**U.S. Department of Labor**

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**Issue Date: 22 June 2006**

CASE NO.: 2004-LHC-00232

OWCP NO. 18-80901

*In the Matter of:*

CHARLES MCDONALD,  
Claimant,

vs.

WILMINGTON IRON WORKS and  
AIG CLAIM SERVICES, INC.  
Employer and Carrier.

**Appearances**

Marilyn Green, Esq.  
For Claimant

Michael W. Thomas, Esq.  
For Employer and Carrier

Before: Alexander Karst  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

Claimant Charles McDonald seeks benefits under the Longshore and Harbor Workers' Compensation Act, *as amended*, 33 U.S.C. § 901 *et seq.* ("the Act"), for injuries arising out of a fall he took while working for Wilmington Iron Works ("Employer")<sup>1</sup>. He alleges that following an initial spine injury, he sustained a cumulative trauma to his back as a result of continued work activities. Employer seeks a finding that there was no cumulative trauma. If cumulative trauma is found to exist, however, Employer contends that Claimant has a residual earning capacity which is higher than his actual post-injury wages and that it is entitled to Special Fund relief.

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<sup>1</sup> On September 16, 2003, Claimant filed this and another claim with the Office of Workers' Compensation Programs ("OWCP"). The difference between the two claims is that Majestic Insurance Company was Employer's carrier at the time of Claimant's initial injury on April 18, 2001, while AIG Claims Services was its carrier when Claimant stopped working for Employer on March 28, 2003. Claimant and Majestic reached a settlement of the claim based on the initial injury, which I approved on March 17, 2004 (Case No. 2004-LHC-00231).

## FACTUAL BACKGROUND

Claimant, who was born in 1949, worked for Employer as a machinist from 1977 to 1987 and as a ship repair supervisor from 1987 until 2003. Tr. at 20. Each week, he commuted nearly four hours from his home in Visalia, California to company facilities at the Port of Los Angeles. Tr. at 26–27. As a ship repair supervisor, Claimant supervised a crew of between four and fifteen workers and also performed repairs himself. Tr. at 20–24. Approximately two days per week, Claimant and his crew performed repair work, primarily welding, aboard ships. Tr. at 21. The rest of the time, Claimant worked in the shop doing boat shafting. Tr. at 24.

On April 18, 2001, while supervising work aboard the *Sea-Land Explorer*, Claimant fell ten feet through a hatch onto the floor below. Tr. at 25–26. He was hospitalized for eight days. CX 2. The treating physician, Dr. James London, interpreted an x-ray of Claimant’s spine as revealing a compression fracture of L1, degenerative disease at L4–L5, and mild degeneration at L5–S1 and L3–L4.<sup>2</sup> CX 4. He interpreted a CT scan of the lumbar spine from the date of injury revealing a 20-percent encroachment of the L1 body on the spinal canal. CX 36 at 92. Dr. London testified that the force of Claimant’s fall compressed the L1 vertebra causing it to be “blown out on the back and front.” CX 42 at 137–138. On April 19, 2001, Claimant denied having pain, weakness, or numbness in his extremities. CX 3 at 5.

After returning to work with restrictions on July 9, 2001, Claimant reported that his commute and work activity caused muscle spasms and increased pain. CX 7 at 13; CX 11 at 43. On July 16, 2001, Dr. London noted Claimant’s complaints of constant pain at the thoracolumbar area of his back, which was worse with prolonged standing, walking and physical therapy, but improved with rest. CX 11 at 41. Dr. London recommended physical therapy and ordered Claimant to remain off of work for six weeks. CX 11 at 45. Thereafter, Dr. London periodically certified him as temporarily totally disabled until January 7, 2002. CX 11–14, 17, 19, and 21.

On December 14, 2001, Dr. London released Claimant to return to work without restrictions on January 7, 2002. CX 22. On January 18, 2002, Claimant reported intermittent lumbar pain which radiated into the paraspinal muscles and increased with prolonged standing, walking, twisting, or bending, but no pain in the lower extremities. CX 23 at 63. On March 21, 2002, he reported intermittent pain, improved range of motion, and no lower extremity pain or weakness. CX 24 at 65. In April 2002, Claimant worked a 28-hour shift supervising emergency repair to a ship’s plating. Tr. at 30. To access the plating, he climbed ladders, walked the length of the ship, and stood to inspect welding work. *Id.* On July 9, 2002, Dr. London recorded Claimant’s reports of increased back pain with numbness over the front of the left thigh and knee. CX 25 at 67. On August 5, 2002, Claimant complained of persistent pain. Dr. London certified him as temporarily totally disabled from August 5 until August 26, 2002. CX 26, 27.

On August 12, 2002, Dr. London ordered an MRI of the fracture area which he interpreted as showing an L1 diversion with attendant disc shift, but nothing beyond the previous CT scan from the date of the injury. CX 36 at 92. He diagnosed a disc bulge at L4, but with “no significant effect on the dural sac or the nerves.” CX 36 at 93–94. On August 19, 2002, Dr.

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<sup>2</sup> Dr. London has a medical degree from University of California Medical School and is a board-certified orthopedic surgeon. CX 10. His practice consists of patient care, surgery, and some forensic examinations. CX 42 at 123–124.

London recommended that Claimant return to work. CX 28 at 70. Once back at work, Claimant reported physically demanding working conditions, including frequent bending over a lathe. He said that his back pain had worsened since his return, he was having difficulty sleeping due to a “burning” pain in the left flank, and he had additional pain at “the lumbosacral junction.” CX 31 at 75. On March 31, 2003, Dr. London certified Claimant as temporarily totally disabled from March 28 until April 25, 2003. CX 30, 31. On April 25, 2003, Claimant said he was somewhat improved but still had back pain and left thigh tingling. CX 36 at 95. On May 1, 2003, Dr. London renewed his disability certification for the period of April 25 to June 20, 2003. CX 32–33. Claimant last worked for Employer on March 28, 2003.

In a letter to Employer dated June 24, 2003, Dr. London opined that Claimant sustained an L1 compression fracture as the result of his accident on April 18, 2001, that he returned to regular duty in January 2002, and that work activities thereafter caused him to sustain cumulative trauma to his back continuing up until the time he stopped working and went on temporary total disability on March 28, 2003. CX 37 at 109; CX 34. He pronounced Claimant’s condition “permanent and stationary,” and restricted him from carrying, lifting, pushing, or pulling over 25 pounds, and performing repetitive bending, prolonged sitting, standing or driving. He said that Claimant cannot to return to his prior type of work. CX 36 at 96–97; CX 37 at 109.

Dr. London testified that although he released Claimant to work without restrictions in January 2002, he ideally would have preferred Claimant to avoid heavy work. CX 36 at 98, 103. However, he felt it was reasonable for Claimant to try to return to work because “I think he indicated it was kind of an all or nothing situation, either he could do it or he’d have to leave that line of work.” CX 36 at 103. Dr. London recalled that before March 28, 2003, Claimant “had symptoms, but he was able to do his work.” CX 36 at 90. He opined that the fractures alone are not likely the cause of Claimant’s ultimate disability. CX 36 at 97.

Employer challenges Dr. London’s conclusions with the testimony of Dr. David S. Kim, who evaluated Claimant on July 21, 2003.<sup>3</sup> Dr. Kim disagrees with Dr. London’s conclusion that Claimant sustained cumulative trauma. Tr. at 75–76.

From June 24, 2003 until approximately March 2004, Claimant continued to submit to Employer temporary total disability slips issued by Dr. London. Tr. at 36, 38–39. On May 4, 2004, Claimant reported that he had decreased pain in the thoracolumbar junction and left flank with use of a supportive brace. CX 41 at 117. However, Dr. London recommended no changes in the permanent disability or work restrictions imposed on June 24, 2003. *Id.*

To evaluate Claimant’s potential for return to alternative work, OWCP engaged the services of Linda Ferra, a rehabilitation counselor. Tr. at 106-107. Ms. Ferra prepared a report and testified at trial at Claimant’s request. Tr. at 124. She met with Claimant on March 3, 2004 to discuss his work history, education, medical restrictions, and vocational interests. Tr. at 106. Ms. Ferra prepared Claimant’s resume and periodically provided lists of companies to contact for interviews. Tr. at 43. She estimated a job search would last from 90 to 120 days. Tr. at 116.

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<sup>3</sup> Dr. Kim is a board-certified orthopedic surgeon and a forensic expert. Tr. at 73–74. He spends 30-percent of his time treating patients and performing surgery at Tustin Hospital, and 70-percent of his time performing medical evaluations for defendants, plaintiffs, and independent clients. Tr. at 73, 100.

Employer retained Kathryn E. Melamed, a certified Department of Labor rehabilitation counselor, to perform labor market surveys of the Visalia and Long Beach areas. Tr. at 137. Ms. Melamed interviewed Claimant and reviewed his medical records, vocational test results, and Ms. Ferra's reports. Tr. at 139. She relied on the physical restrictions imposed by Dr. London on June 23, 2003.<sup>4</sup> Tr. at 141. She concluded that Claimant scored extremely well on vocational tests and is employable "just about anywhere," depending on the labor market. Tr. at 142. She testified that Visalia had the highest unemployment rate in California, but Claimant's education and experience make him a stronger candidate than most job-seekers in Visalia. Tr. at 171.

Ms. Melamed identified various jobs in the Visalia area, including machinist, courier, customer service representative, security guard, telemarketer, retail manager, and retail salesman. EX 8 at 57–62. The report listed two local machine shops, one in Tulare with no open positions, and one in Lemoore which had recently hired. Tr. at 145; EX 8 at 59–60. Ms. Melamed's report identified one telemarketing position which paid \$9 per hour. EX 8 at 60. Ms. Melamed also identified two positions at Home Depot, salesman and assistant store manager. EX 8 at 60–62. Claimant applied for those jobs, but received no response. Tr. at 68. Claimant testified that he also applied at Lowe's Home Improvement, but the job would have violated Dr. London's restrictions. Tr. at 66–67. The report also listed courier jobs which were rejected by Dr. London because they required prolonged sitting or driving. EX 9 at 114; CX 42 at 134.

In October 2003, Claimant discussed with Employer the possibility of returning to work for it as a lathe operator at some point in the future. Tr. at 37. On March 3, 2004, Ms. Ferra again discussed Claimant's possible return to modified duty with Mr. Walker Richards, Claimant's former supervisor. Tr. at 107. Mr. Richards told Ms. Ferra that Employer could not accommodate Claimant's physical restrictions. Tr. at 107. Weeks later, Claimant contacted Mr. Richards to once again revisit the possibility of his return. Ms. Ferra created a job analysis explaining the work Claimant could perform. Tr. at 108-109. Employer received the job analysis and revised it to describe the job it felt Claimant would have to perform if he returned. Dr. London approved the revised analysis provided that Claimant would not have to lift, push, or pull over 25 pounds. On May 10, 2004, Mr. Richards informed Claimant that Employer would not accommodate these restrictions. Tr. at 109. Claimant testified that during this time, he did not seek other work because he thought Employer might rehire him. Tr. at 53–54.

After learning he would not be rehired by Employer, Claimant inquired about shafting work with Tom Dorris, a former co-worker operating his own ship repair business. Claimant testified that Mr. Dorris expected the shafting work to be slow until August. Tr. at 42. According to Claimant, the job would have paid \$25 per hour. Tr. at 55. In July 2004, Claimant revisited his inquiry but Mr. Dorris asked Claimant to sign some kind of waiver, which Claimant declined to do. Tr. at 56. Claimant testified that he also contacted prospective employers he found on the internet and some identified by Ms. Ferra. Tr. at 46. He applied for jobs at Cheese and Protein International, Laidlaw Transit, Whitten Machine, and Sierra View Golf Course. Tr. at 43–44. He testified that some of the jobs violated his restrictions, and some of the companies did not respond. Tr. at 57–60, 62–63.

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<sup>4</sup> After Ms. Melamed's labor market survey, Dr. London advised Claimant to stop commuting the nearly 200 miles to Long Beach. CX 42 at 134. Employer offered no evidence to dispute Dr. London's opinion. Accordingly, the jobs considered by Ms. Melamed in the Long Beach area will not be considered.

Also in July 2004, Claimant applied for a job as a car salesman with Liberty Chevrolet in Selma, California. He was hired on August 2, 2004. The job paid minimum wage to start and transitions into commission-based pay. Tr. at 45. On June 9, 2005, Claimant moved to reopen the evidentiary record of this proceeding in order to submit proof of his actual wages since the time of trial.<sup>5</sup> The late submitted evidence establishes Claimant's gross earnings between August 2, 2004 and September 15, 2005. SX 1, 2, 3.

## DISCUSSION

The following findings and conclusions are based on a review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. The parties have stipulated, and I find, that: (1) Claimant injured his back on April 18, 2001 in the course and scope of employment with Employer; (2) Claimant was injured at a maritime situs while engaged in a maritime activity; (3) Claimant seeks compensation and medical benefits for a cumulative trauma through March 28, 2003; (4) Claimant worked for Employer through March 28, 2003; (5) the claim is timely; (6) Claimant's average weekly wage is \$1,182.07; and (7) Claimant reached maximum medical improvement on June 24, 2003. The primary issues in dispute are: (1) whether Claimant sustained cumulative trauma; (2) nature and extent of disability; (3) whether Employer is entitled to Special Fund Relief; and (4) whether Employer is entitled to a credit under section 3(e) of the Act.

### 1. Cumulative Trauma Injury

A worker's injury is not compensable unless it arose out of and in the course of employment. See 33 U.S.C. §902(2). The term "injury" includes the aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). If the disability is at least partially the result of a subsequent injury that aggravates, accelerates or combines with a prior injury, then the employer or carrier at the time of the most recent injury is responsible for the benefits due the claimant. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1105, 37 BRBS 89 (9th Cir. 2003). If the disability results, however, from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the carrier on the risk at the time of the earlier injury is responsible for payment of benefits. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9<sup>th</sup> Cir. 1991).

Claimant asserts that he sustained cumulative trauma as a result of his work activities through March 28, 2003, which aggravated his April 18, 2001 spine injury. Employer contends that Claimant's work activities did not aggravate the April 2001 injury, but rather that any back-related disability is the result of the natural progression of that original injury. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). To invoke the section 20(a) presumption, a claimant must show that he sustained physical harm, and that an accident occurred or working conditions existed that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984), *aff'd*, 799 F.2d 1308 (9th Cir. 1986). I find that Claimant

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<sup>5</sup> Employer did not respond to Claimant's motion, which was granted by Order dated July 5, 2005.

has shown that he sustained physical harm through the medical records and testimony of Dr. London, as well as his own testimony that his work activities caused him increased pain. He also has shown that working conditions existed that could have caused the harm: he worked long hours, frequently on his feet, climbing ladders, or bending over. Accordingly, section 20(a) shifts the burden to Employer to rebut the presumption that Claimant's spine injury was aggravated by his employment. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998).

Employer may overcome the presumption "by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). Once the presumption is rebutted, it no longer controls and the case is decided on the record as a whole, with the claimant bearing the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Employer seeks to rebut the section 20(a) presumption with the opinion of Dr. Kim. Dr. Kim testified that any pain or symptoms Claimant experienced after returning to work were mere "flare-ups" and were not indicative of a cumulative trauma injury or a permanently worsened spinal condition. I find this testimony sufficient to rebut the presumption that Claimant sustained cumulative trauma caused by his working conditions. See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Accordingly, it is necessary to consider the evidence as a whole to determine whether Claimant has shown that he sustained cumulative trauma as a result of his employment through March 28, 2003.

Dr. London and Dr. Kim agree that Claimant sustained a severe burst compression fracture at L1. However, they disagree about whether Claimant sustained cumulative trauma after he returned to work January 2002. Dr. London opined that Claimant sustained cumulative trauma as a result of his continued work activities. His conclusion is based on the facts that Claimant's condition initially improved after he returned to work but then deteriorated after July 2002, and required additional restrictions to control his increased symptoms. CX 42 at 140, 148-49. In considering medical evidence, the Ninth Circuit has held that a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998).

Dr. Kim disagrees with Dr. London's conclusion that Claimant sustained cumulative trauma. TR 75-76. Dr. Kim diagnosed a healed compression fracture at L1, "with residuals." EX 5 at 17, 35. He explained that compression fractures generally result in continued and indefinite back pain, which may increase with physical activity, even after the fracture heals. Tr. at 77, 94-95, 102. He therefore felt that the symptoms Claimant experienced after returning to work in 2002 were "acute flare-ups whenever he did strenuous working activities [such as] an 18-hour shift or a 28-hour shift." TR 77. Dr. Kim testified that subjective complaints of pain alone cannot support a diagnosis of cumulative trauma or a permanent increase in disability. Tr. at 81 and EX 5 at 17. He further testified that in assessing cumulative trauma, he looks for "permanent symptoms that show objectively" such as arthritis, joint narrowing, bone spurs or disc herniation. TR 82-83. He said that the August 2002 MRI of Claimant's lumbar spine did not show such changes as compared with the lumbar CT scan from the date of injury. Dr. Kim felt there should be an additional MRI to confirm the presence or absence of objective changes in his condition, since the most recent MRI was performed about eight months before his last day at work. EX 5 at 17. He said that a second MRI is necessary in order for either him or Dr. London to determine with certainty whether Claimant sustained cumulative trauma. However, Dr. Kim also testified that "it was very clear ... that there was no cumulative trauma." Tr. at 97-98.

Dr. Kim's testimony regarding the importance of objective findings struck me as contradictory and evasive. He testified that he would change his diagnosis if a current MRI should reveal objective changes, but he implied that in the absence of "objective findings" that his diagnosis is accurate while Dr. London's diagnosis is clearly wrong. Tr. at 98. When questioned further by Claimant's counsel, he evaded the issue.<sup>6</sup> See Tr. at 103-04. Thus, I find that the absence of a second MRI is not dispositive. Moreover, I find that Dr. London's opinion was lucidly explained, and I credit his findings in accordance with *Amos*. Dr. London's treatment records reflect that the nature and the frequency of Claimant's pain changed after he returned to work for Employer. Claimant had muscle spasms and intermittent low back pain in 2001 and early 2002. After two months on the job, he continued to have intermittent low back pain, but reported improved range of motion. Around July 2002, however, he developed low back pain associated with tingling and numbness in his left leg. On March 28, 2003, he stopped working but continued to experience constant low back pain with a burning sensation as late as July 2003 when Dr. Kim evaluated him. EX 5 at 33. At trial, Claimant testified that his current symptoms include moderate low back pain in the left side of the pelvis, which is different from the pain he had upon returning to work in January 2002. I find that Claimant's testimony is credible and well-documented in the records of Dr. London.

On balance, I find Dr. London's testimony to be far more persuasive than that of Dr. Kim. Thus, even apart from the fact that *Amos* requires that special weight be given to the testimony of Dr. London, I credit his conclusions and find that Claimant's work activities through March 28, 2003 aggravated his prior spinal condition, and resulted in a compensable cumulative trauma. I further find that the cumulative trauma combined with Claimant's prior injury caused him to be unable to continue working for Employer after March 28, 2003. Accordingly, I find that Respondent AIG, the carrier on the risk at that time, is responsible for

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<sup>6</sup> By Claimant's counsel:

Q: Dr. Kim, is it your testimony that absent changes on a CAT scan or MRI, a treating doctor, who observes a patient longitudinally over a period of several years, is not able to make a diagnosis of a continuous trauma? Is that your testimony?

A: He made ample diagnosis about his condition and findings. Only changes would be he changed his mind without restriction to continuous trauma afterward.

Q: That's not what I asked you, Doctor. I asked you whether it is your testimony that a physician, who observes a patient longitudinally and treats him over a period of two years, is incapable of making a diagnosis of a continuous trauma without changes on a CAT scan or an MRI?

A: I don't know whether he's capable of diagnosing continuous trauma. I had vast experience, over 20 years, by evaluating continuous trauma claims.

Q: I still don't think we have gotten an answer to the question. I asked you, Doctor, whether a treating physician is capable or incapable, assuming the physician is competent, of making such a diagnosis?

A: That's exactly what I'm trying to answer. How much experience he has in dealing with continuous trauma case, and if he knows what he's talking about, then it's different story [*sic*].

Q: And is it your testimony that Dr. London does not know what he's talking about?

A: I didn't say anything like that. I just don't know him. I don't know him at all. Tr. at 103-04

Claimant's benefits. See *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1105, 37 BRBS 89 (9th Cir. 2003).

## **2. Extent of Disability**

The extent of disability is an economic as well as medical concept. A claimant establishes a prima facie case of total disability by showing that he is unable to return to his usual employment. Once that showing is made, the burden shifts to the employer to establish suitable alternative employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9<sup>th</sup> Cir. 1980). Total disability becomes partial on the earliest date that alternative employment is established. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1257 (9<sup>th</sup> Cir. 1990).

Dr. London opined on June 24, 2003 that Claimant cannot return to his previous job as a ship repair supervisor. Accordingly, Claimant has made a prima facie showing of total disability because he is unable to return to his usual and customary employment. Therefore, the burden shifts to Employer to demonstrate the existence of suitable alternate employment which is available to Claimant. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259–60 (1990). To meet this burden, an employer must identify specific jobs that the claimant can perform considering his “technical and verbal skills, as well as the likelihood, given the claimant’s age, education, and background, that he would be hired if he diligently sought the possible job.” *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9<sup>th</sup> Cir. 1988). The employer may demonstrate that suitable alternate employment was available retroactively, so long as it overcomes “the inherent limitations of credible and trustworthy evidence.” *Stevens*, 909 F.2d at 1260.

Employer argues that suitable alternate employment was available to Claimant as of June 24, 2003, the date that Dr. London pronounced him permanent and stationary. Claimant argues he had no reason to seek alternate employment until he was informed on May 10, 2004 that Employer would not accommodate his restrictions. He also submits that he diligently sought employment beginning on May 10, 2004 and ultimately secured a job on August 2, 2004, which is the earliest date that alternative employment was available to him.

Ms. Melamed testified for Employer that she identified several positions which were suitable for and available to Claimant as of June 24, 2003, the date on which Dr. London opined he reached maximum medical improvement. However, for the reasons explained below, I am not persuaded by this testimony. First, I find that Claimant was unaware of his physical restrictions until March 2004, when he specifically requested them from Dr. London. Indeed, Claimant continued to receive *temporary* total disability slips from Dr. London from June 23, 2003 through March 2004, and Employer continued to pay benefits on them. Secondly, I find that Claimant reasonably hoped to return to light duty work for Employer, and therefore reasonably refrained from pursuing alternate employment, until Employer ultimately informed him that it would not accommodate his physical restrictions in May 2004. Finally, I note that Ms. Melamed estimated that a successful job search would probably take 60 to 90 days, and that Ms. Ferra testified that it might take 90 to 120 days. Based on their respective testimony, they at least agree that 90 days to obtain a job would be reasonable. Claimant began his job with Liberty Chevrolet on August 3, 2004, which is about 90 days after he found out that he could not return to work for Employer. Accordingly, I find that Claimant was totally disabled until August 2, 2004, and his disability became partial after that date.

The question that remains is the extent of Claimant's post-injury wage-earning capacity. Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). If they do not, or if the claimant has no actual wages, then the administrative law judge must fix a reasonable wage-earning capacity based on factors such as age, physical condition, education, industrial history, and the number of hours or weeks actually worked per week or year. *Abbott v. Louisiana Ins. Guaranty Assn.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). The party contending that a claimant's actual earnings are not representative of his wage earning capacity has the burden of establishing a reasonable alternative wage earning capacity. *Grage v. Martinac Shipbuilding*, 21 BRBS 66 (1988).

Employer contends that Claimant's actual wages at Liberty Chevrolet do not fairly represent his post-injury wage-earning capacity. It argues that its vocational expert established that Claimant is capable of earning at least \$22 per hour as a machinist, but has not diligently pursued this job. I find Employer's contention to be without merit. Ms. Melamed's report listed six machine shops in the Visalia area and she testified that she spoke about Claimant to two of them, one in Tulare and one in Lemoore. TR 145; EX 8 at 59-60. She reported that the Tulare shop did not have "any current openings," and that the Lemoore shop "had recently hired someone." EX 8 at 59. On cross-examination, Ms. Melamed acknowledged that Claimant's machine shop experience was before 1977 and that some tools in the industry had changed since then, but she explained that employers train applicants with a "general aptitude." Tr. at 165. When asked whether the shops would pay \$22 per hour to an applicant who had not performed similar work for 27 years, Ms. Melamed responded, "I presented the skills, the background, and experience. It wasn't said to me, 'No.' I can't say they would say, 'Yes.'" Tr. at 166. I find this testimony insufficient to establish that a better paying realistic employment opportunity exists, in a machine shop or elsewhere. Moreover, I find that Employer's suggestion that Claimant was not a diligent job seeker is outweighed by Claimant's credible testimony that he contacted employers identified by both vocational experts, tried to arrange a position with Mr. Dorris, and also contacted employers that he tracked down on his own. In fact, Claimant eventually learned about and secured the job with Liberty Chevrolet on his own initiative. As a result, I find that Employer has not met its burden of establishing a reasonable alternative wage-earning capacity.

Claimant has been employed by Liberty Chevrolet since August 2, 2004. SX 1. He testified that he applied for the job because it was "something I could do to eliminate the lifting and all the other restrictions, bending and stooping." Tr. at 44. Claimant said that during his interview, he was told they wanted "someone my age" and they "liked my maturity." *Id.* He explained that the job paid \$200 per week for an initial training period, after which he could earn from \$3000 to \$5000 per month in commissions "if [he] were motivated and stayed out in the lot." Tr. at 64. Claimant's demeanor and his 26-year career with Employer in Los Angeles, which required a very long weekly commute, lead me to conclude that he is an industrious individual who has striven to earn the highest wages possible. Respondents have presented no evidence that Claimant is a slacker. These considerations and the vocational evidence lead me to conclude that the job at Liberty Chevrolet was the best option for Claimant, given that the limitations due to his industrial injury forced him to change lines of work at an age when starting a new career can be difficult in a market favoring young and healthy workers. Thus I find that his switch to car sales was an entirely reasonable career move, and that his actual earnings in

2004 and 2005, which started low but increased as time went on, reasonably represent his post-injury wage-earning capacity.

In 2004, Claimant earned \$1,421.03 in September, \$1,656.86 in October, \$1,787.96 in November, and \$1,381.37 in December. SX 2. In 2005, Claimant earned \$1,676.36 in January, \$1,999.89 in February, \$1,186.44 in March, \$3,011.23 in April, \$1,602.41 in May, \$3,098.24 in June, \$5,958.41 in July, \$3,795.47 in August, and \$1,683.28 in September. SX 3. I find that Claimant's training period, during which he was learning the art of selling cars, lasted the first five months of his career, from August 2004 through December 2004. During this period, his retained wage-earning capacity was \$287.75 per week. Claimant's actual earnings at Liberty Chevrolet during 2005 represent his new wage-earning capacity thereafter. Thus, I find the weekly average of his actual 2005 earnings, \$651.43 per week, to be his retained earning capacity from January 1, 2005 and continuing into the future.<sup>7</sup>

When post-injury wages are used to establish wage-earning capacity, the wages earned in the post-injury job must be adjusted to represent the wages which that job paid at the time of the claimant's injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Here, there is no evidence in the record as to the wages paid by Liberty Chevrolet in March 2003, when Claimant stopped working for Employer. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") should be applied to adjust post-injury wages downward when the actual wages paid at the time of the claimant's injury are unknown. *Id.* See also, 33 U.S.C. §906(b)(1)-(3). Accordingly, I find that Claimant's post-injury wage earning capacity should be adjusted downward by reference to the percentage increase in the NAWW.

### **3. Special Fund Relief**

Employer argues that it is entitled to Special Fund relief pursuant to 33 U.S.C. § 908(f). Special Fund relief is available if three requirements are met: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the current disability is not due solely to the most recent injury. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9<sup>th</sup> Cir. 1982). In cases of permanent partial disability, it must also be shown that the ultimate disability is materially and substantially greater than that which would have resulted from the new injury alone. See 20 C.F.R. §702.321(a)(1).

A pre-existing condition is a "disability" for purposes of section 8(f) when it is such that a cautious employer would be motivated to discharge the employee because of a greatly increased risk of compensation liability. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399 (D.C. Cir. 1977). Knowledge of a pre-existing disability is imputed to an employer when it is "readily discoverable from the employee's medical record in the possession of the employer." *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 1111 (9<sup>th</sup> Cir. 1991). Here, Claimant sustained his initial injury on April 18, 2001 while working for Employer. X-rays

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<sup>7</sup> Claimant calculates his 2004 average weekly earnings at Liberty Chevrolet as follows: 2004 earnings were \$6,247.22 for 152 days of work; 152 days / 7 days=21.71 weeks; \$6,247.22 / 21.71 weeks=\$287.75 per week. SX 2. Earnings in 2005 total \$24,011.73 for 258 days of work; 258 days / 7 days=36.86 weeks; \$24,011.73 / 36.86 weeks = \$651.43 per week. SX 3. I find these calculations to be substantially correct and adopt them.

revealed a burst compression fracture of L1 and “narrowing of the L4-5 intervertebral disc from degenerative disease and mild degenerative change at L5-S1 and L3-4.” CX 4 at 7; TR 27. I find that Claimant’s spinal injuries constitute a serious and lasting physical problem such that a cautious employer would be motivated to discharge him. I further find that Claimant’s pre-existing condition was manifest to Employer prior to March 28, 2003, as Employer had actual knowledge of the injury when it occurred and it was “readily discoverable” from Claimant’s medical records. Accordingly, the first two requirements for section 8(f) relief are satisfied.

Employer also must show that Claimant’s pre-existing disability contributed to his permanent disability. There are two aspects to this requirement. First, the ultimate disability must not be due solely to the subsequent injury. Dr. London opined that Claimant sustained cumulative trauma as a result of his work activities through March 2003. CX 36 at 97. He testified that Claimant’s back was “better” when he initially returned to work in January 2002 than when he stopped working in March 2003. CX 36 at 104. Dr. London acknowledged that Claimant would have been disabled without the cumulative trauma, but felt the disability was increased as a result thereof. CX 36 at 97-98. I find this testimony sufficient to establish that Claimant’s current level of disability is not due solely to the cumulative trauma injury.

Because Claimant’s permanent disability is partial, Employer must also establish that the disability is materially and substantially greater than that which would have resulted from the new injury alone. *See* 20 C.F.R. §702.321(a)(1). Dr. London testified that the April 2001 injury alone would engender physical restrictions against lifting or carrying more than 35 to 50 pounds. CX 42 at 132. He further testified that as a result of subsequent cumulative trauma, Claimant should have restrictions against lifting or carrying loads of 25 pounds or greater. CX 42 at 132-33. Dr. London concluded that the “injury of 4/18/01 created pre-existing wholeman impairment that combines with the impairment that resulted from the continuous trauma between 2/01 and 3/28/03 to produce a greater total impairment than would have been present from the continuous trauma . . . alone.” EX 7. In light of the foregoing, I find that Employer has established that Claimant’s pre-existing spinal condition contributed to his ultimate disability. Accordingly, I find that Employer is entitled to Special Fund relief.

#### **4. Section 3(e) Credit**

Employer requests a credit for disability payments made to Claimant by the California Educational Development Department (“EDD”). Section 3(e) provides a credit to employers for benefits paid under other workers’ compensation laws for the same injury for which benefits are claimed under the Act. 33 U.S.C. §903(e). Claimant testified at trial that he filed for “state disability” in May 2003 and received \$25,480 in benefits. Tr. at 35. Employer provided no evidence either as to the amount or the source of state benefits received by Claimant. Even if it were assumed that the “state disability” benefits alluded to by Claimant were paid by California EDD as asserted by Employer, there remains a question of whether EDD benefits qualify as “workers’ compensation” benefits under section 3(e). *See Manen v. Exxon Corp.*, 36 BRBS 331 (ALJ) (April 5, 2002) (finding EDD benefits are not workers’ compensation benefits that can be credited under section 3(e), since they are not employer subsidized and are treated as separate from workers’ compensation benefits under California law). *But see, Milosevich v. Metropolitan Stevedore Co.*, 21 BRBS 114 (ALJ) (March 25, 1988) (ordering employer to pay the amount of a lien of the California EDD, then take a credit for amount paid). In light of its failure to provide

evidence of the source of other payments made to Claimant, however, I find that Employer has not demonstrated its entitlement to a credit for those payments under section 3(e).

### **ORDER**

It is hereby **ORDERED** that:

1. Employer shall pay Claimant compensation for temporary total disability for the period of March 29, 2003 to June 23, 2003, and for permanent total disability for the period of June 24, 2003 to August 2, 2004, based on an average weekly wage of \$1,182.07.
2. Employer shall pay Claimant compensation for permanent partial disability for the period of August 3, 2004 to December 31, 2004, based on an average weekly wage of \$1,182.07 and a retained wage-earning capacity of \$287.75 per week, in accord with 33 U.S.C. §908(c)(21). Beginning on January 1, 2005 and continuing into the future, Employer shall pay Claimant compensation for permanent partial disability based on an average weekly wage of \$1,182.07 and a retained wage-earning capacity of \$651.43 per week, in accord with 33 U.S.C. §908(c)(21).
3. Claimant's compensation for permanent partial disability shall be adjusted for inflation as discussed in the last paragraph of Section 2 of this Decision and Order.
4. Employer shall pay interest on each unpaid installment of compensation at the rates prescribed under the provisions of 28 U.S.C. §1961.
5. Employer is entitled to section 8(f) special fund relief.
6. Employer is not entitled to a credit under section 3(e).
7. The District Director shall make all calculations necessary to carry out this order.
8. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 C.F.R. § 702.132 within twenty days after the filing of this Order. He shall thereupon discuss the petition with opposing counsel with a view to reaching an agreement on fees and costs. No later than fifteen days after the filing of the fee petition, Claimant's counsel shall file written notice of what, if any, agreements have been reached. Within fifteen days thereafter, Employer's counsel shall file detailed objections to any unresolved items. Claimant's counsel may reply to objections within fifteen days.

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ALEXANDER KARST  
Administrative Law Judge

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